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No. 574

IN THE

Supreme Court of the United States

DAVID MASLOWSKY, GEORGE CHRISTOPHER, SAM J. KAPLAN, F. W. SCHELLENBERGER, IRVING L. GOTTLIEB and BARBARA SLOVE,

Appellants,

vs.

JOHN E. CASSIDY, JR., Chairman, PAUL F. ELWARD, ALBERT W. HACHMEISTER, CECIL A. PARTEE, THOMAS F. RAILSBACK and GEORGE M. BURDITT, Members of the Illinois House of Representatives Commission, created under House Bill 2269, 74th Illinois General Assembly,

Appellees.

On Appeal From The Supreme Court Of The State Of Illinois.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

No.

DAVID MASLOWSKY, GEORGE CHRISTOPHER, SAM J. KAPLAN, F. W. SCHELLENBERGER, IRVING L. GOTTLIEB and BARBARA SLOVE,

Appellants,

vs.

JOHN E. CASSIDY, JR., Chairman, PAUL F. ELWARD, ALBERT W. HACHMEISTER, CECIL A. PARTEE, THOMAS F. RAILSBACK and GEORGE M. BURDITT, Members of the Illinois House of Representatives Commission, created under House Bill 2269, 74th Illinois General Assembly,

Appellees.

On Appeal From The Supreme Court Of The State Of Illinois.

JURISDICTIONAL STATEMENT

Appellants appeal from the opinion and judgment of the Supreme Court of Illinois entered in case No. 39710 on March 24, 1966 (rehearing denied on May 18, 1966) in which the Supreme Court of Illinois reversed in part and remanded with instructions the orders entered July 14, 1965, and August 30, 1965 by the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois. Ap-

pellants respectfully submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal under 28 U.S.C. § 1257(2), and that substantial questions are presented herein.

Opinions Below

The opinion of the Supreme Court of Illinois is reported in 34 Ill. 2d 456, 216 N.E. 2d 669 (1966). A copy is attached as Appendix 1.

The orders and memorandum opinions of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, not reported, entered and filed on July 14 and August 30, 1965, are attached as Appendices 2, 3, 4 and 5, respectively.

Jurisdiction.

This action was instituted by appellants in the Circuit Court in Sangamon County, Illinois, to quash subpoenas served upon the Clerk of the Illinois Circuit Court in Sangamon County, Illinois, by a Commission of the Illinois House of Representatives, (the "House Commission"), and for an injunction prohibiting the Commission from using evidence obtained surreptitiously by unknown persons through the use of electronic eavesdropping and wiretapping devices installed under a desk and on the telephone in appellants' hotel room, in violation of appellants' rights under the Illinois Eavesdropping Act (Ch. 38, § 14-1 to 14-7, Ill. Rev. Stat. 1965; see Appendix 8, App. 30), Section 605 of the Federal Communications Act (47 U.S.C. § 605), and the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

This case involves the validity under the United States Constitution of the statute which created the House Commission (Illinois General Assembly House Bill 2269, 1 Laws of Ill., 74th General Assembly at 1855 (1965), see Appendix 6, App. 26) which was introduced in and passed by the

Illinois General Assembly after the eavesdropping and wiretapping came to public attention.

The judgment of the Circuit Court was entered on August 30, 1965. The judgment of the Supreme Court of Illinois was entered on March 24, 1966. Rehearing was denied May 18, 1966. (Appendix 9, App. 33-34.) The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963); *Mercantile Nat. Bk. of Dallas* v. *Langdeau,* 371 U.S. 555 (1963); *Slochower* v. *Board of Education,* 350 U.S. 551 (1956).

Constitutional Provisions and Statutes Involved

The following constitutional provisions and statutes are involved in this case:

(1) Illinois House of Representatives bill 2269, 1 Laws of Ill. at 1855, 74th General Assembly (1965), approved July 21, 1965, the full text of which is set forth in Appendix 6, App. 26.

(2) The Illinois Eavesdropping Act (Ch. 38, §§ 14-1 to 14-7, Ill. Rev. Stat. 1965), the pertinent portions of which are set forth in Appendix 8, App. 30.

(3) The First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, the pertinent portions of which are set forth in Appendix 7, App. 29.

(4) Section 605 of the Federal Communications Act (47 U.S.C. § 605), the pertinent portions of which are set forth in Appendix 7, App. 30.

Questions Presented

1. Whether the retroactive partial repeal of Section 14-5 of the Illinois Eavesdropping Act, occasioned by the

enactment of House Bill 2269, so as to deprive appellants of the protections afforded by the Illinois Eavesdropping Act to all other victims of illegal electronic eavesdropping taking place in Illinois, violates appellants' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether House Bill 2269 violates the United States Constitution because it authorizes a commission of the Illinois legislature to make use of and disclose evidence which was obtained in violation of appellants' rights under the United States Constitution.

The following subsidiary questions are involved:

(a) Whether the tape recordings were obtained in violation of appellants' rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

(b) Whether this Court should reconsider its decision in *Burdeau* v. *McDowell,* 256 U.S. 465 (1921), in light of *Elkins* v. *United States,* 364 U.S. 206 (1960), *Rea* v. *United States,* 350 U.S. 214 (1956), and *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and hold that the Fourth, Fifth, Ninth and Fourteenth Amendments require suppression and exclusion of evidence unlawfully obtained by a person who has no connection with any state, federal or local governmental body.

(c) Whether the Fourteenth Amendment requires exclusion of unlawfully obtained evidence in hearings before a state legislative commission.

(d) Whether evidence obtained in violation of constitutional rights may be suppressed only by one who faces potential criminal liability arising out of that evidence, and, if so, whether appellants have any such potential liability.

3. Whether House Bill 2269 is unconstitutional because it is in conflict with Section 605 of the Federal Communications Act.

STATEMENT*

Following is a chronological summary of the facts of this case:

The Surreptitious Electronic Eavesdropping In Appellants' Hotel Room

Appellants are members and officials of the Chicago Currency Exchange Association, Inc. (R. 18-28.) In April, May and June, 1965, appellants Maslowsky, Gottlieb and Kaplan were in Springfield, Illinois attending the 1965 session of the Illinois General Assembly as representatives of the Association. (A. 18.) At the outset, they leased a room at a local hotel for the duration of the session. (A. 2.)

A person or persons unknown, through the use of electronic eavesdropping and telephone wiretapping devices, "bugged" appellants' hotel room and "tapped" their hotel room telephones, and tape recorded a number of appellants' private telephone and hotel room conversations. (A. 2, 5-6, 18-20.) The eavesdropping and wiretapping were accomplished without appellants' knowledge or permission. (A. 2, 5-6.)

The tape recordings of appellants' conversations in their hotel room and on the telephone, as well as typewritten excertps therefrom, were delivered anonymously to a columnist for *Chicago's American*, a major Chicago metropolitan newspaper. On June 24, 1965, the newspaper printed ex-

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* "A." refers to the Abstract of Record in case No. 39526 in the Supreme Court of Illinois, the case involving the grand jury.

"E." refers to the Excerpts From Record in case No. 39710, the case at bar, involving the Illinois House of Representatives Commission.

"R." refers to portions of the record on appeal which are not included in the Abstract or Excerpts.

cerpts from the recordings, identifying four of the appellants and other persons as participants in the conversations. Thereafter, the columnist delivered the tapes and typewritten excerpts to the State's Attorney of Sangamon County, Illinois. (A. 17-20.)

The Grand Jury Investigation and Subpoenas

The State's Attorney thereupon convened a special grand jury to investigate alleged violations of the bribery provisions of the Illinois Criminal Code. Each of the appellants was served with a subpoena commanding him or her to appear before the Sangamon County Grand Jury on July 15, 1965, and to produce the records of the Chicago Currency Exchange Association, Inc. (A. 15, 17.)

Before the return day of the subpoenas, appellants presented a verified petition (A. 1-13) to the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, for an order (i) quashing the grand jury's subpoenas, (ii) impounding the tape recordings and excerpts therefrom, and any evidence derived from or through use of the recordings or excerpts, into the custody of the Clerk of the Circuit Court, and (iii) suppressing as evidence before the grand jury, any court, administrative body or legislative commission, the recordings or any evidence obtained therefrom. The grounds alleged in support of this petition were:

A. That the tape recordings were obtained in violation of appellants' rights under the Illinois Eavesdropping Act. (Ch. 38, §§ 14-1 to 14-7, Ill. Rev. Stat. 1965; see Appendix 8), which contains a broad prohibition against all forms of electronic eavesdropping (§ 14-2), and which provides in Section 14-5:

> "Evidence Inadmissible. Any evidence obtained in violation of this Article is not admissible in any civil

or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings. . . ."

Section 14-6 of the Eavesdropping Act provides that any party to a conversation recorded in violation of the Act may obtain an injunction to prohibit disclosure or any other use of the recordings; and

B. That use of these tapes would violate appellants' rights to be free from unreasonable searches and seizures, their privileges against self incrimination, and their rights of privacy, guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and their rights under Section 605 of the Federal Communications Act. (A. 7-8.)

In the petition, appellants also alleged (A. 2,6):

" . . . Said recordings were represented to have been made by 'bugging' said room by means of electronic devices that pierced the side walls of the aforesaid hotel room regularly occupied by petitioners as registered guests, and tapped the telephone in said room. The alleged bugging and recording were wholly without the knowledge, authority or permission of petitioners. . . .

• • •

" . . . Petitioners are informed and believe that the aforesaid tape recordings and transcripts if authentic, and if recording their voices, resulted from an unlawful, unauthorized and surreptitious 'bugging' of private conversations between them, or telephone conversations over the telephone, in their hotel room in Springfield, Illinois."

On July 14, 1965, following a hearing on the State's Attorney's motion to dismiss, in which the well pleaded allegations of the appellants' petition were admitted by the

State's Attorney (A. 31-40), the Circuit Court entered the order requested by appellants (A. 27-31; see Appendix 2), and filed a short memorandum opinion which stated that the recordings were obtained in violation of appellants' rights under the Illinois Eavesdropping Act, and that:

> "It further appears from the Petitions and Exhibits that the constitutional rights of petitioners have been violated, and those violations provide additional grounds for the Court's order."

The order of July 14, 1965 quashed the grand jury subpoenas, impounded the tapes and excerpts into the custody of the Circuit Court Clerk, prohibited the Clerk from disclosing the contents of or releasing the impounded evidence to any one except upon order of the court, and prohibited use of the recordings or derivative evidence before any grand jury, in any court, or in any administrative or legislative inquiry or proceeding. (A. 28-29.)

The State's Attorney perfected a direct appeal from the order to the Supreme Court of Illinois.

The Enactment of House Bill 2269 and the Creation of the Illinois House of Representatives Commission.

Meanwhile, during the last few days of the 1965 session of the Illinois General Assembly at the end of June, 1965, and subsequent to the newspaper publication of the excerpts and delivery of the tapes to the State's Attorney, a bill known as House Bill 2269 was introduced, and thereafter passed by the General Assembly. The bill was approved by the Governor of Illinois on July 21, 1965 (see Appendix 6), which was one week after the entry of the impounding and injunction order of July 14. This bill established a commission of the Illinois House of Representatives (the "House Commission") and vested it with the following powers and duties (*inter alia*):

"a. To investigate the background, allegations and charges arising out of the information contained in tape recordings and transcripts thereof which were delivered to the State's Attorney of Sangamon County on Wednesday, June 23, 1965 [the tapes and excerpts here in question] insofar as they reflect upon or involve civil officers of the State whether they be members of the General Assembly or not, or any prior or further such tape, allegation or charge.

* * *

"d. To cooperate to the fullest extent with the State's Attorney of Sangamon County in investigating, verifying, collecting and preserving any and all evidence bearing upon the charges and allegations arising out of said tape recordings and the transcripts thereof developed by the commission during the course of its performance of its duties.

"e. To make a written report from time to time, and not less frequently than once each month, of the results of its investigations to the Governor of this State and to the Speaker of the House of Representatives, which reports shall be placed on file with the Secretary of State of the State of Illinois and open to public inspection."

The bill also conferred subpoena power upon the House Commission.

The Commission's Subpoena To the Clerk and Entry of the Second Impounding and Injunction Order.

On August 19, 1965, the House Commission served a legislative subpoena *duces tecum* on the Clerk of the Circuit Court of Sangamon County commanding him to produce before the House Commission the material, including the tapes and excerpts, which had been impounded in his custody pursuant to the Circuit Court's order of July 14, 1965. (E. 58-59.) Appellants thereupon presented a verified petition to the Circuit Court requesting that the subpoena be quashed and that the Commission be enjoined from making

any use of the impounded material or evidence derived therefrom. (E. 52-57.) This petition alleged in part (E. 54):

> "6. The use by the Commission of the aforesaid tape recordings or excerpts therefrom, or witnesses or information derived therefrom, will violate the order entered by this Court on July 14, 1965, and will violate petitioners' rights under Section 14-5 of the Illinois Eavesdropping Act, under the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution . . ."

Appellants also prayed that House Bill 2269 be declared repugnant to the United States Constitution. (E. 55-56.)

Appropriate notice was given to the Commission. (E. 49-50). The Commission appeared at the hearing through its Chairman and filed a motion to dismiss the petition on the ground that the Circuit Court was without jurisdiction to grant any of the relief prayed. (E. 66-67).

On August 30, 1965, following oral argument on the petition and motion, the Circuit Court entered an order (i) denying the Commission's motion to dismiss, (ii) quashing the subpoenas served by the Commission upon the Clerk, (iii) suppressing the recordings and excerpts thereof, and any information derived therefrom, as evidence before the Commission, and (iv) enjoining the Commission from using those materials. (E. 69-70; see Appendix 4, App. 24; the Circuit Court's memorandum opinion is Appendix 5, App. 25.)

The House Commission thereafter perfected a direct appeal from the order to the Supreme Court of Illinois. (E. 76-77.)*

* Before appealing, the Commission applied to the Supreme Court of Illinois for leave to file an original mandamus proceeding to expunge the order on the ground that it was void for want of jurisdiction in the Circuit Court to enter it. The application was denied on September 15, 1965. (E. 90.)

The Hearing Held By the Commission on November 5, 1965 Despite the Injunction Order.*

In spite of the injunction order of August 30, 1965 and the pendency of the Commission's appeal from that order, and over the protests of appellants' counsel to the Commission, (E. 105-113), the Commission held a public hearing on November 5, 1965 at which three witnesses called by the Commission testified concerning the tape recordings and excerpts in question. Appellants' counsel were not afforded an opportunity to cross examine the witnesses.

The newspaper columnist testified to his anonymous receipt of the tapes and excerpts, and his identification of certain voices. (E. 116-163.)

Another witness (E. 163-183) testified that it took approximately 15 hours to listen to the recordings (E. 169); that he was present when state officials searched appellants' hotel room on June 24 or 25, 1965 (after appellants had checked out of the hotel); that two round black marks were found underneath desks in each of two adjoining rooms (where small electronic microphones were apparently secreted); that holes had been drilled through the bottom of the desks near the round marks, and glue was found around the entire bottom of the desks; that a patch of electrical or friction tape was located on the cord of a desk lamp leading to an electrical outlet; and that a hole was found leading through the wall of a closet into an adjoining room which contained "the phone setup for the floor." (E. 173-7.)

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* The transcript of this hearing was filed in the Circuit Court in connection with contempt proceedings brought against the members of the Commission for the violation by them of the Circuit Court's injunction order. Although no appeal was taken from the contempt orders, the transcript of the November 5, 1965 hearing was filed with the Clerk of the Illinois Supreme Court on the Commission's appeal from the injunction order.

The third witness (E. 184-216), an employee of a civic organization located in Chicago, testified that during the 1965 session of the Illinois General Assembly, he received information from the columnist that appellants' hotel room was being "bugged"; that he thereupon rented a room in the hotel directly across the hall from appellants' room; and that he attempted unsuccessfully, by means of a short-wave radio, to hear the electronic broadcast of appellants' recorded conversations. (E.191-205.)*

The Ruling of the Supreme Court of Illinois.

By agreement between the parties, an order was entered by the Supreme Court of Illinois (per Mr. Justice Walter V. Schaefer) on December 8, 1965, impounding the tape recordings and excerpts into the custody of the Clerk of the Illinois Supreme Court. (The tapes and excerpts are still being held by the Clerk pursuant to that order.)

The Supreme Court of Illinois ordered that the appeals of the State's Attorney and the House Commission be consolidated for oral argument.

Copies of the printed briefs filed by the parties in the Supreme Court of Illinois are included in the record on

* Shortly after these hearings were held, and upon motion of appellants, the Circuit Court entered a rule against the members of the Commission to show cause why they should not be held in contempt of court for their violation of the Circuit Court's order of August 30, 1965 by holding the above-described hearings on November 5, 1965. (E. 89-93.) None of the members appeared in response to the petition. The court below entered rules to show cause, which were personally served upon each Commission member, but they again failed to respond. Each of the members of the Commission was thereafter adjudged to be in wilful contempt of court in that he had violated the order entered on August 30, 1965. (E. 94-102, 224-245.) However, upon determining that the Commission had desisted from further violations of the order, the court below continued the matter of punishment for the contempt until the outcome of this appeal. (E. 251-252.) The Supreme Court of Illinois was not asked to and did not rule upon the contempt orders.

appeal in this Court. In their briefs, appellants contended (i) that the recordings had been obtained in violation of their rights under Illinois law, under the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, and under Section 605 of the Federal Communications Act (Brief in No. 39526, pp. 21-27; Brief in No. 39710, pp. 34-41), (ii) that the recordings and all evidence derived therefrom were inadmissible before the House Commission as well as before the grand jury (Brief in No. 39526, pp. 27-38; Brief in No. 39710, pp. 36-56), and (iii) that House Bill 2269 would violate the Equal Protection Clause of the Fourteenth Amendment if the Illinois Supreme Court accepted the Commission's argument that House Bill 2269 partially repealed the Illinois Eavesdropping Act, in that appellants would then be the only victims of wiretapping and eavesdropping in Illinois who were not afforded the protection of and the relief afforded by that Act (Brief in No. 39710, pp. 57-81). Appellants argued that it was immaterial that the eavesdropper was unknown and apparently had no official connection with the federal or state government, and further that the exclusionary rule of the Fourteenth Amendment to the United States Constitution is applicable in state legislative commissions as well as in state courts.

On March 24, 1966, the Supreme Court of Illinois filed a single opinion in the two cases. (App. 1 to 19; 34 Ill.2d 456, 216 N.E.2d 669.) The Court affirmed that portion of the order entered by the Circuit Court on July 14, 1965 which quashed the grand jury subpoenaes and enjoined the State's Attorney from making any use of the tape recordings or evidence obtained therefrom before the grand jury.* The Court based this ruling upon the pro-

* Justices Schaefer and Underwood dissented on the ground that petitioners failed to establish that the Eavesdropping Act had been violated. (App. 15 to 19.) The majority of the Court held that the verified petitions adequately established a violation of the Act in both the grand jury and House Commission cases. (App. 4 to 6.)

visions of the Illinois Eavesdropping Act, and therefore did not reach the alternative federal constitutional issues. (App. 6 to 14.)

In the House Commission's appeal, the Supreme Court of Illinois reversed the orders of the Circuit Court entered on July 14 and August 30, 1965, insofar as they quashed the Commission's subpoena and prohibited the House Commission from utilizing the tapes and excerpts in its legislative inquiry. The Court held that the enactment of House Bill 2269 constituted a retroactive partial implied repeal of the provision of Section 14-5 of the Illinois Eavesdropping Act prohibiting the use before any "legislative inquiry or proceeding" of eavesdrop evidence obtained in violation of the Act. (App. 13.) The Court also held that House Bill 2269 created an exception to Section 14-5 so as to permit the use by the House Commission of the particular tapes and excerpts here involved. The Court rejected the argument that as thus interpreted House Bill 2269 violates appellants' rights under the Equal Protection Clause. The Court also rejected appellants' contention that the Act, so construed, invaded rights guaranteed to them by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. (App. 13 to 14.)*

In their petition for rehearing (which is included in the record on appeal in this Court), appellants again pressed their alternative contentions under the United States Constitution. On May 18, 1966, the Supreme Court of Illinois denied appellants' petition for rehearing without altering its opinion.

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* The Supreme Court also rejected the argument of the House Commission that the order enjoining the House Commission breached the doctrine of separation of powers. The Court said, "We see no valid separation-of-powers problem in the entry of either of the orders under review." (App. 14.)

The judgment of the Supreme Court of Illinois partially reversing the orders of July 14 and August 30, 1965, is set forth in Appendix 9, App. 33 to 34.

On August 10, 1966 appellants filed their notice of appeal to this Court with the Clerk of the Illinois Supreme Court.* (The State's Attorney has not sought review in this Court of the judgment of the Illinois Supreme Court in the grand jury case.)

How the Constitutional Questions Were Preserved

In the two verified petitions filed by appellants in the Illinois Circuit Court, appellants urged (*inter alia*) that the eavesdropping and wiretapping of their personal conversations violated (i) their rights to be free from unreasonable searches and seizures, their rights of privacy, and their privileges against self incrimination, guaranteed by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and (ii) Section 605 of the Federal Communications Act. (A. 7-8; E. 54-56.)

These arguments were also advanced by appellants to the Supreme Court of Illinois. (Brief in No. 39526, pp. 24-26, 34-36; Brief in No. 39710, pp. 36, 38-41, 57-59; Petition For Rehearing in No. 39710, pp. 8-12.)

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* The Supreme Court of Illinois granted appellants' request that its mandate be stayed pending application for review by this Court on petition for writ of certiorari. However, on August 30, 1966, the Court denied appellants' motion for further stay of mandate pending disposition of this appeal. Appellants thereupon presented an application for stay of mandate to the Honorable Tom C. Clark, Associate Justice of this Court. The Commission filed objections. An *in camera* hearing was held before Mr. Justice Clark on September 12, 1966. On September 13, 1966, Mr. Justice Clark entered an order staying the mandate of the Illinois Supreme Court pending the action of this Court in this case, conditioned upon the expedited docketing and filing of the record and appellants' jurisdictional statement on or before September 19, 1966.

In the motion to dismiss filed by the House Commission in the Illinois Circuit Court (E. 66-67), the Commission relied solely upon the contention that the separation of powers doctrine deprived any Illinois court of jurisdiction over the Commission. (E. 66-67.) In the Supreme Court of Illinois, however, the Commission argued that House Bill 2269 was an implied partial repeal of the Illinois Eavesdropping Act. In their answering brief and petition for rehearing, appellants contended that if House Bill 2269 were construed to effect a retroactive partial repeal of the Illinois Eavesdropping Act, appellants' rights under the Equal Protection Clause of the Fourteenth Amendment would be violated. (Brief in No. 39710, pp. 57-81; Petition For Rehearing in No. 39710, pp. 2-8.)

All of these contentions are set forth in appellants' notice of appeal to this Court filed on August 10, 1966 with the Clerk of the Illinois Supreme Court, and in appellants' motion to stay the mandate of the Illinois Supreme Court which was presented to and granted by Mr. Justice Tom C. Clark.

THE QUESTIONS ARE SUBSTANTIAL

I.

THIS APPEAL PRESENTS SUBSTANTIAL QUESTIONS AS TO WHETHER THE RETROACTIVE PARTIAL REPEAL OF THE ILLINOIS EAVESDROPPING ACT DEPRIVES APPELLANTS OF EQUAL PROTECTION OF THE LAW.

The Supreme Court of Illinois has held that House Bill 2269 effected a partial implied repeal of the provisions of the Illinois Eavesdropping Act (Ch. 38, § 14-5, Ill. Rev. Stat. 1965, App. 30), which prohibit the use of evidence obtained by means of illegal eavesdropping in any inquiry or proceeding conducted by commissions of the Illinois legislature. The Supreme Court of Illinois necessarily also held that House Bill 2269 is a partial implied repeal of Section 14-6 of the Illinois Eavesdropping Act which affords to all victims of electronic eavesdropping a cause of action against those who seek to publish evidence obtained in violation of the Act, for injunctive relief to prevent publication of such evidence and for actual and punitive damages. (Eavesdropping, as defined in Section 14-2 of Illinois Act, includes publication of unlawfully recorded conservations.)

The Court acknowledged that appellants have established that they are victims of unlawful electronic eavesdropping which resulted in the tape recordings involved in this case.

Accordingly, the exceptions carved out of the Illinois Eavesdropping Act by House Bill 2269, as construed by the Illinois Supreme Court, *apply to these appellants, and to no one else in the world.* With the exception of appellants, all victims of illicit eavesdropping which have taken place or may in the future take place in Illinois retain the rights granted by the Eavesdropping Act (a) to prevent

Illinois legislative commissions from using or publishing the illegally obtained evidence, (b) to obtain damages for violations of the Act, and (c) to seek to bring about criminal prosecution against the members of any legislative commission which uses or publishes the tainted recordings.

Thus, the Illinois legislature has selected the victims of one particularly flagrant violation of the Illinois Eavesdropping Act and has retroactively stripped them of the protections which were afforded by Illinois law at the time the eavesdropping occurred.

The practical effect of this decision is that Section 14-5 of the Illinois Eavesdropping Act now reads in pertinent part:

> "Any evidence obtained in violation of this Article is not admissible in any admininstrative or legislative inquiry or proceeding, except the evidence which was obtained in violation of this Act during April, May and June, 1965, in the Springfield, Illinois hotel room of Messrs. David Maslowsky, Irving Gottlieb and Sam Kaplan, which evidence is admissible before and may be publicly disclosed by the Commission created by House Bill 2269."

Further, the provisions of Section 14-6 providing that the victims of illegal eavesdropping are entitled to injunctive relief to prevent eavesdropping, and to actual and punitive damages against those guilty of eavesdropping, now are available to all but appellants.

We do not contend that the Equal Protection Clause requires Illinois to provide the exclusionary rules contained in Section 14-5 and the remedial provisions contained in Section 14-6. Nor do we contend that the Equal Protection Clause prohibits the Illinois legislature from providing reasonable exceptions to the Illinois Eavesdropping Act if the exceptions apply in a non-discriminatory fashion to all

members of an excepted class. This Court has held, for example, that the states may enact different rules of evidence applicable to all persons located in designated geographical areas within a state, where there is a rational basis for the distinction. *Salsburg* v. *Maryland*, 346 U.S. 545 (1954) (evidence obtained through illegal search and seizure admitted in certain counties in Maryland for certain gambling misdemeanors); compare *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 229-232 (1964).

Appellants contend that, having provided protections available to all victims of unlawful electronic eavesdropping occurring in Illinois, the Illinois legislature may not retroactively carve out particular exceptions which apply only to certain persons.

In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79 1901), this Court held a Kansas statute violated the Equal Protection Clause because it established a system of legislative controls apparently applicable to all stock yards doing business in Kansas, but which actually governed only one company.

More recently, this Court in *Morey* v. *Doud*, 354 U.S. 457 (1957), held that a statute expressly exempting one company from its licensing and regulatory requirements violated the Equal Protection Clause (354 U.S. at 467):

> ". . . The singling out of the money orders of one company is in a sense the converse of a case like *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79, 114-115. . . . In the *Cotting case* this Court held that a regulatory statute that in fact applied to only one stockyard in a State violated the Equal Protection Clause. . . ."

In *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), involving a Florida criminal statute prohibiting cohabitation be-

tween interracial couples, this Court pointed out that "... legislative discretion to employ the piecemeal approach stops short of permitting a State to narrow statutory coverage to focus on a racial group . . . 'When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious discrimination as if it had selected a particular race or nationality for oppressive treatment.' " (379 U.S. at 194.)

The exception carved out by the Illinois legislature to the general application of the Illinois Eavesdropping Act is far more discriminatory than those which were held invalid in the *Cotting, Morey* or *McLaughlin* cases. Here the legislature has selected for discriminatory treatment not an entire class (persons suspected of bribing members of the Illinois legislature), but rather supposed particular members of the class. The discrimination is all the more egregious because of its retroactive nature. The evidence here involved was obtained in violation of the Act, and until July 21, 1965 (the day House Bill 2269 took effect) appellants were undoubtedly entitled to avail themselves of the protections and remedies afforded by the Illinois Eavesdropping Act. Thus, the Illinois Supreme Court held that the provision of the July 14, 1965 order prohibiting the use or public disclosure of the contents of the tape recordings and excerpts before any administrative or legislative inquiry or proceedings (App. 20) "was proper at the time it was entered, but became subject to modification [as to appellants] when the General Assembly spoke through H.B. 2269," which became effective on July 21, 1965. (App. 15.)

The Supreme Court of Illinois mistakenly rejected appellants' equal protection and other constitutional claims for the following reasons (App. 14):

> ". . . The petitioners have not been indicted, nor in fact, even accused of a crime. Under our views hereinbefore expressed, the tapes and excerpts cannot be used as evidence before a grand jury or in a criminal proceeding against them because of the unaffected provisions of the eavesdropping statute remaining in full force after the adoption of H.B. 2269. The petitioners have been and may well be further embarrassed by disclosures on the tapes (as may others named therein) but this legislative investigation gives them no constitutional grounds for objection."

This reasoning is completely erroneous. The Equal Protection Clause is not limited in application to situations involving possible criminal liability. Many landmark decisions of this Court interpreting the Equal Protection Clause have dealt, not with criminal liability, but with such matters as the right of a voter to have his ballot weighed equally with those of other voters, *Reynolds* v. *Sims*, 377 U.S. 533 (1964), or the right of a citizen to use facilities such as swimming pools, parks, schools and golf courses on a non-segregated basis, *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Mayor and City Council of Baltimore City* v. *Dawson*, 220 F.2d 386 (4th Cir. 1955), *aff'd.* U.S. 877 (1955) (per curiam); *Holmes* v. *City of Atlanta*, 223 F.2d 93 (5th Cir. 1955), *aff'd.* 350 U.S. 879 (1955) (per curiam).

Appellants respectfully submit that the discriminatory, retroactive exception created by House Bill 2269, by which their rights—and theirs only—under the Illinois Eavesdropping Act were repealed, is a violation of their rights under the Fourteenth Amendment to equal protection of Illinois law, and that this question is a substantial one warranting a direct appeal to this Court under 28 U.S.C. § 1257(2).

II.

THIS APPEAL RAISES SUBSTANTIAL QUESTIONS AS TO WHETHER HOUSE BILL 2269 TRANGRESSES THE CONSTITUTION OF THE UNITED STATES BECAUSE IT AUTHORIZES A COMMISSION OF THE ILLINOIS LEGISLATURE TO MAKE USE OF AND PUBLICLY DISCLOSE EVIDENCE OBTAINED IN VIOLATION OF APPELLANTS' RIGHTS UNDER THAT CONSTITUTION.

Apart from the foregoing serious equal protection questions raised by House Bill 2269, there is another substantial issue as to the constitutional validity of that bill. Appellants contend that the tape recordings were obtained in violation of their rights under the United States Constitution, wherefore the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961) prohibits use of the recordings by the state legislative commission. This contention raises four subsidiary issues which we discuss seriatim in Parts A through D below:

A. Did the method (wiretapping and electronic room bugging) by which appellants' private conversations were surreptitiously intercepted and tape recorded violate appellants' rights under the United States Constitution? (Part A, pp. 23 to 26 below.)

B. Does the United States Constitution prohibit the use or public disclosure by a state agency of evidence obtained by a private person (as distinguished from one having official connection with a federal, state or municipal government) in violation of rights of others protected by the federal constitution? (Part B, pp. 27 to 29 below.)

C. Does the United States Constitution prohibit state legislative commissions as well as state courts from using the product of unlawful searches and seizures and electronic eavesdropping? (Part C, pp. 30 to 33 below.)

D. Is the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961) available to one upon whom an unlawful invasion of privacy has been perpetrated and evidence thereby unlawfully obtained, but as to whom no potential criminal liability appears to exist arising out of the evidence he seeks to suppress? If so, can it be said with reasonable certainity that appellants face no risk of criminal liability arising out of the evidence involved here? (Part D, pp. 33 to 34 below.)

A.

This Appeal Presents Substantial Questions As To Whether Appellants' Rights Under the United States Constitution Were Violated By the Kind of Eavesdropping Involved Here.

One of the important questions presented by this appeal is whether the means by which the tape recordings were obtained violated appellants' rights under the United States Constitution. Appellants urged in the courts below that their rights to privacy, to be free from unreasonable searches and seizures, and their privileges against self-incrimination, were breached by the covert "bugging" of their hotel room and tapping of their hotel telephone.*

Serious and substantial questions are involved herein:

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* The Circuit Court held that "the constitutional rights of petitioners have been violated, and those violations provide additional grounds for the Court's order [of July 14, 1965]." (App. 23.) The Supreme Court of Illinois held that appellants' rights under the Illinois Eavesdropping Act had been violated, but that appellants' claims of violation of rights under the federal Constitution were without merit since appellants were protected against use of the recordings and excerpts in criminal proceedings brought in Illinois. We discuss this subject in Part D, pp. 33 to 34 below.

(1)

HAVE APPELLANTS' RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, GUARANTEED BY THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BEEN VIOLATED BY THE KIND OF ELECTRONIC EAVESDROPPING AND WIRE TAPPING INVOLVED HERE?

In two recent cases this Court held that the Fourth, Fifth and Fourteenth Amendments required suppression of evidence obtained through surrepitious eavesdropping.

In *Silverman* v. *United States,* 365 U.S. 505 (1961), the eavesdropping was accomplished by the use of a so-called "spike mike" which pierced the wall of the defendants' room, so as to make contact with the heating ducts in which voices were carried.

In *Clinton* v. *Virginia,* 377 U.S. 158 (1964) *affirming per curiam,* 204 Va. 275, 130 S.E.2d 437 (1963), the eavesdropper used an electronic device attached to the eavesdropper's side of a party wall adjacent to the defendant's home.

An important issue presented by this appeal is whether these two cases, together with *Mapp* v. *Ohio,* 367 U.S. 643 (1961), undermine and effectively repudiate *Irvine* v. *California,* 347 U.S. 128 (1954). In *Irvine,* police secreted eavesdropping devices in the defendant's home during several illegal trespasses. All eight members of this Court who participated in the decision agreed that the eavesdropping violated "the fundamental principle declared by the Fourth Amendment" proscribing unreasonable searches and seizures (347 U.S. at 132). However, Irvine's conviction was affirmed by an equally divided Court; four of the eight members of the Court relying upon the holding in *Wolf* v. *Colorado,* 338 U.S. 25 (1949), that the federal exclusionary rule was not applicable to the states through the Fourteenth Amendment: "... We adhere to *Wolf* as stating the law of search-and-seizure cases. . . . (347 U.S. at 134.)

In *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court overruled *Wolf* and held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments" (367 U.S. at 657.) Explaining in *Mapp* why *Wolf* was not overruled in *Irvine*, this Court said that at the time *Irvine* was decided the Court believed that the states should have "adequate opportunity to adopt or reject the [*Weeks*] *rule.*" (367 U.S. at 654.)

Since *Mapp* overruled *Wolf*, the basis for *Irvine* has been undermined. It therefore appears that the Fourteenth Amendment requires exclusion of evidence obtained by means of eavesdropping devices secreted on premises lawfully occupied by the victim.*

(2)

HAVE APPELLANTS' RIGHTS OF PRIVACY UNDER THE FIRST, FOURTH, FIFTH, NINTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION BEEN VIOLATED?

The constitutional basis of the right of privacy [personal repose and sanctity of one's home, etc.] was elucidated in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), which dealt with a state statute making the use of contraceptive devices or drugs a crime. Mr. Justice Douglas, speaking for a majority of this Court, said (381 U.S. at 484-485):

> "The Fourth and Fifth Amendments were described in *Boyd* v. *United States*, 116 U.S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp* v. *Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a 'right to privacy,

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* The lessee of a hotel room has a sufficient possessory interest to give him standing to move to suppress evidence unlawfully obtained through unlawful entry to that room. *Jones* v. *United States*, 362 U.S. 257, 266-267 (1960).

> no less important than any other right carefully and particularly reserved to the people.'. . .
>
> "We have had many controversies over these penumbral rights of 'privacy and repose.'. [Citing cases.] These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."

Whether the principle of *Griswold* is applicable to electronic eavesdropping is an important and substantial question raised by this case. It is common knowledge that the incidences of eavesdropping have increased alarmingly in recent years. It appears relatively certain that unless this Court intervenes, the precious right of our citizenry to carry on private conversations may be lost. One author aptly describes electronic eavesdropping as "the ultimate invasion of privacy." (Williams, "The Wiretapping—Eavesdropping Problem: A Defense Counsel's View," 44 Minn. L. Rev. 855, 866, 1960.) Professor Thomas I. Emerson recently wrote, "The scientific possibilities are so fantastic and the invasion of privacy so devastating that it is hard to believe a civilized society will not feel compelled to throw up some protection to individuals." 64 Mich. L. Rev. 219, 232-233 (1965).

House Bill 2269, as interpreted by the Supreme Court of Illinois, authorizes the use of the evidence obtained by the illicit eavesdropping and wiretapping perpetrated upon appellants irrespective of any provisions of the Constitution of the United States. The validity of that statute under the federal Constitution raises the foregoing timely and substantial issues, which deserve the plenary consideration of this Court.

B.

This Appeal Presents Substantial Questions As To Whether the Exclusionary Rule Applies Where the Evidence Was Obtained By A Person Having No Official Connection With Any Governmental Body, Federal, State or Municipal.

The identity of the person or persons who "bugged" appellants' hotel room and tapped their telephone is unknown. Thus there is presented the important federal question of whether the right of privacy, and the search and seizure exclusionary rule, apply only if it appears that the eavesdropper is associated with an agency of the federal government or a state or municipal body.

In *Burdeau* v. *McDowell*, 256 U.S. 465 (1921)—decided long before the "silver platter" doctrine was abrogated and the exclusionary rule was made applicable to the states—this Court held that the Fourth Amendment was not violated when incriminating documents obtained illegally by persons who were not agents of the federal government were turned over to and retained for use by the United States as evidence in a federal criminal prosecution.

Appellants submit that this Court should reconsider its holding in *Burdeau* in light of *Elkins* v. *United States*, 364 U.S. 206 (1960), *Rea* v. *United States*, 350 U.S. 214 (1956), and *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In *Elkins*, this Court did away with the "silver platter" doctrine in cases involving illegal searches and seizures by state or local governmental agents. In *Rea*, this Court authorized an injunction to prevent federal agents from turning over the product of an unlawful search to state agents. In *Mapp*, this Court held that the rule requiring exclusion of unlawfully obtained evidence was applicable to the states through the Due Process Clause of the Fourteenth Amendment.

The rationale of these cases, especially that of *Elkins*, undermines the holding in *Burdeau*. In *Elkins*, this Court said,

> ". . . To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis." (364 U.S. at 215.)

Likewise, it matters not to the victim whose privacy has been violated whether the invasion was perpetrated by a governmental agent or by another private citizen. The anomaly which Mr. Justice (then Judge) Benjamin N. Cardozo perceived in the federal-state aspect of the "silver platter" doctrine, in *People* v. *Defore*, 242 N.Y. 13, 22-23, 150 N.E. 585, 588 (1926) (noted in *Elkins*, 364 U.S. at 215, fn. 7) exists with regard to the governmental-private citizen aspect of the doctrine, as the late Justice Floyd E. Thompson of the Supreme Court of Illinois observed:

> ". . . That the inadmissibility of evidence can be made to depend upon the antecedent and wholly unrelated fact that the unreasonable search by which it was unlawfully obtained was made by a petty Federal officer instead of by a city policeman *or a private individual* is not founded in reason or law. . . . If it is the purpose of the rule to protect the outraged citizen he is entitled to the protection under one situation as much as under the other. . . ." (Emphasis added; *People* v. *Castree*, 311 Ill. 392, 413 (1924) (dissent).)

The exclusionary rule "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." (*Elkins* v. *United States*, 364 U.S. at 217 (1960).) This

reasoning supports the exclusion and prohibition of any public disclosure of *all* evidence obtained through violations of privacy, including that illegally obtained by persons who are not agents of any governmental body.

Under the *Burdeau* rule private citizens are tempted to engage in unlawful eavesdropping or searches, and then deliver the results thereof to the police or other governmental agencies, legislative, executive or judicial, or to other private persons.* The case at bar affords clear proof that this is a real and practical problem.

The uncertainty generated by *Elkins, Rea* and *Mapp* as to present vitality of the *Burdeau* rule is reflected in several recent decisions. See, for example, *Sackler* v. *Sackler,* 15 N.Y. 2d 40, 255 N.Y.S. 2d 83, 203 N.E. 2d 481 (1964), reversing 224 N.Y.S. 2d 790 (N.Y. Sup. Ct. 1962); *Williams* v. *United States,* 282 F.2d 940, 941 (6th Cir. 1960); *United States* v. *Goldberg,* 330 F.2d 30 (3d Cir. 1964) *cert. denied,* 377 U.S. 953 (1964); *Knoll Assoc., Inc.* v. *Dixon,* 232 F. Supp. 283, 286-87 (S.D.N.Y. 1964).

This Court should take this case to resolve the serious questions thus posed concerning the continuing vitality of the rule of *Burdeau* v. *McDowell,* 256 U.S. 465 (1921).

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* Private electronic eavesdropping is becoming widespread throughout the United States. See: *Hearings Before the Subcommittee on Constitutional Rights, Senate Committee on the Judiciary,* 85th Cong., 2d Sess. (1958); 86th Cong., 1st Sess. (1960); Report and Order, F.C.C. Doc. No. 15262, Released Feb. 28, 1966; DASH, SCHARTZ & KNOWLTON, THE EAVESDROPPERS (1959); HOFSTADTER & HOROWITZ, RIGHT TO PRIVACY (1964); PACKARD, THE NAKED SOCIETY (1964); Long, *You Ought to be Left Alone,* Esquire, May, 1966, p. 102.

C.

This Appeal Presents Substantial Questions As To Whether the Exclusionary Rule Is Applicable Before State Legislative Commissions, As Distinguished From Administrative Agencies and Courts.

This case presents an important and substantial question as to the applicability of certain federal constitutional rights before state legislative commissions.

Throughout this case, counsel for appellees have argued that the strictures of the Fourth, Fifth, Ninth and Fourteenth Amendments have no application to proceedings before a state legislative commission, particularly the one created by House Bill 2269.

The Supreme Court of Illinois did not rule upon this question, although it correctly held that there is "no valid separation-of-powers problem in the entry of either of the orders under review." (App. 14.)

The Commission's contention is founded upon a philosophy of government which has been rejected by this Court since *McCulloch* v. *Maryland,* 4 U.S. 466 (1819).

The Commission created by House Bill 2269 is not free by virtue of its legislative inception to violate rights guaranteed by the United States Constitution. The Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution draw no distinction between the various organs of government. The Fourth Amendment, for example, speaks only of the right of all citizens to be secure in their houses, papers and effects. The Fourteenth Amendment refers generally to the states, not merely to state courts. Accordingly, it matters not what branch of state government threatens the violation; the constitutional rights of privacy and freedom from unreasonable searches and seizures, and the related right to suppress unlawfully obtained evidence are protected against incursion by all who act in the name of the state, including state legislative commissions.

Thus, in *Quinn* v. *United States*, 349 U.S. 155 (1955), this Court spoke of legislative investigations such as that being conducted by the House Commission (349 U.S. at 161):

> ". . . Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

In *Nelson* v. *United States*, 208 F.2d 505, 513 (D.C. Cir. 1953), *cert. denied* 346 U.S. 827, this doctrine was succinctly stated with regard to the federal government:

> ". . . The Fourth Amendment exempts no branch of the federal government from the commitment that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated* * *.' This constitutional guarantee applies with equal force to executive, legislative, and judicial action. . . ."

In many recent cases, courts have recognized that federal constitutional rights are guaranteed against erosion by state legislative commissions.*

In *Jordan* v. *Hutcheson*, 323 F.2d 597, 601 (4th Cir. 1963), the court said:

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*E.g., *Dombrowski* v. *Pfister*, 380 U.S. 479, 497-498 (1965) (chairman of state legislative committee and other state officials enjoined from pursuing criminal prosecution of former committee witness); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957) (Due Process Clause of Fourteenth Amendment applicable in state legislative investigation); *Jordan* v. *Hutcheson*, 323 F.2d 597 (4th Cir. 1963), and the cases cited at pages 601-602 (upholding District Court's jurisdiction to enjoin a committee of the Virginia legislature from violating plaintiffs' First Amendment rights); *Bush* v. *Orlean Parish School Board*, 188 F.Supp. 916, 922 (E.D. La. 1960), *affd.* 365 U.S. 569 (1961) (per curiam) (Commission of the Louisiana legislature enjoined from executing state laws designed to perpetuate segregation in public schools).

"... Although the federal courts will recognize and respect the state's right to exercise through its legislature broad investigatory powers, nevertheless these powers are not unlimited and it remains the duty of the federal courts to protect the individual's constitutional rights from invasion either by state action or under color thereof. ..."

The exclusionary rule embodied in the Fourteenth Amendment is not limited to criminal prosecutions or judicial proceedings.*

In *Dreyer* v. *Illinois*, 187 U.S. 71 (1902), this Court said (187 U.S. at 84):

"Whether the legislative, executive or judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking pertain to another department of government, is for the determination of the State. And its determination one way or the other, cannot be an element in the inquiry whether the due process of law prescribed by the Four-

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* *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (illegally seized evidence inadmissible in state forfeiture proceeding); *Lassoff* v. *Gray*, 207 F. Supp. 843, 846-848 (W.D. Ky. 1962) (illegally seized evidence inadmissible in taxpayer's suit contesting validity of tax assessment); *Rogers* v. *United States*, 97 F.2d 691, 692 (1st Cir. 1938) (illegally seized evidence inadmissible in civil action to recover customs duties); *Burack* v. *State Liquor Authority of New York*, 160 F.Supp. 161 (E.D. N.Y. 1958) (state liquor authority enjoined from using illegally obtained evidence); *Kohn* v. *Superior Court*, 55 P.2d 1186 (Calif. 1936) *affd.* 70 P.2d 989 (1937) (illegally obtained documents inadmissible in civil replevin suit); *Carson* v. *State*, 221 Ga. 299, 144 S.E.2d 384 (1965) (illegally seized evidence inadmissible in public nuisance abatement action); *Leogrande* v. *State Liquor Authority of State of New York*, 268 N.Y.S. 2d 433 (1966) (illegally obtained evidence inadmissible before state liquor commission); see Annot., 5 A.L.R.3d 670 (1966); see also *Annenberg* v. *Roberts*, 2 A.2d 612, 618 (Pa. 1938) (injunction issued to restrain enforcement of overly broad subpoena issued by state legislative committee).

teenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty."

In light of this discretion accorded the states as to the manner of apportioning the functions of state government, it would be inconsistent with the absolute protection granted by the Fourth, Fifth and Fourteenth Amendments to make their availability dependent upon the vehicle employed by state authorities to make use of the fruits of an unlawful invasion of the privacy of United States citizens.

D.

This Case Presents a Substantial Question As To Whether Unlawfully Obtained Evidence May Be Suppressed Only By One Who Has Potential Criminal Liability Arising Out of Matters Contained In the Evidence, and, If So, Whether Appellants Have Any Such Risk Of Criminal Liability.

The Supreme Court of Illinois rejected appellants' contentions respecting House Bill 2269 because "the tapes and excerpts cannot be used as evidence before a grand jury or in a criminal proceeding against them because of the unaffected provisions of the eavesdropping statute remaining in full force after the adoption of H.B. 2269." (App. 14.)

This appeal thus presents the novel, substantial and important issue of whether the exclusionary rule of *Mapp* v. *Ohio,* 367 U.S. 643 (1961), is available to one who has no potential criminal liability arising out of the evidence he seeks to suppress. Cf. *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892).

If potential criminal liability is a prerequisite to a motion to suppress, this appeal presents the further question of whether the unrepealed provisions of the Illinois Eavesdropping Act provide appellants with *complete* protection from all possible criminal prosecutions based upon the tape recordings or information derived therefrom. Appellants

submit that despite the protections afforded by the Illinois Eavesdropping Act against prosecutions under Illinois law arising from information contained in the tapes, they are nevertheless subject to criminal prosecution under the laws of the federal government and every state other than Illinois. Furthermore, Section 14-5 of the Eavesdropping Act is not an immunity statute. It merely prohibits the *use of certain* evidence against appellants in the courts of Illinois. No grant of immunity is contained therein which would protect appellants in jurisdictions other than Illinois. Cf. *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964).

These important issues likewise warrant the attention of this Court.

III.

THIS APPEAL PRESENTS SUBSTANTIAL QUESTIONS AS TO THE VALIDITY UNDER THE CONSTITUTION OF THE UNITED STATES OF HOUSE BILL 2269, IN LIGHT OF SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT.

Section 605 of the Federal Communications Act (47 U.S.C. § 605) contains an absolute prohibition against divulgence of the fruits of all unauthorized interceptions of any telephone call which occurs anywhere in the United States, whether the call is inter- or intrastate. *Nardone* v. *United States*, 302 U.S. 379, 382 (1937), and 308 U.S. 338, 340 (1939); *Weiss* v. *United States*, 308 U.S. 321, 329 (1939).

The admitted allegations of appellants' verified petition establish that the tape recordings resulted in part from surreptitious "taps" placed on the telephone in appellants' hotel room. (A. 2, 6.) A witness testified before the Commission that, during an investigation of the hotel room which appellants had occupied, he found a hole leading from a closet in appellants' room to a small adjoining room

which contained the telephone apparatus for that floor of the hotel. (E. 176-7.) The printed excerpts of the recordings contain one instance of a telephone conversation in which statements made by both parties to the conversation are reported. (A. 19).* These telephone conversations were intercepted without appellants' knowledge or permission. (A. 2, 6.)

In effect, House Bill 2269 purports to be an authorization by the Illinois legislature to one of its own commissions to violate the express command of Section 605 that the fruits of an unlawful telephone wiretap shall not be divulged. House Bill 2269 thus comes into conflict with the rule of *Benanti* v. *United States*, 355 U.S. 96 (1957), in which this Court held that the states may not enact legislation which conflicts with Section 605 or the policy expressed therein (355 U.S. at 105-106):

> "... we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy. *Cf. Pennsylvania* v. *Nelson*, 350 U.S. 497; *Hill* v. *Florida*, 325 U.S. 538; *Hines* v. *Davidowitz*, 312 U.S. 52."

One of the important questions tendered in this appeal is whether, granted that the recordings involved were obtained in violation of Section 605, agents of the state may nevertheless divulge the contents thereof. Appellants submit that the exclusionary rule of Section 605, announced in the *Nardone* cases, should be held applicable to the states under the rationale of *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

The contrary holding of *Schwartz* v. *Texas*, 344 U.S. 199 (1952)—that under certain circumstances the states may use evidence obtained in violation of Section 605—no longer appears to be the law, because *Schwartz* relied in large

*It must be borne in mind that the printed excerpts contain but a few minutes of the material contained on the 15 reels of tape recordings which take approximately 15 hours to play in full. (E. 121, 133).

measure upon *Wolf* v. *Colorado*, 338 U.S. 25 (1949), which this Court overruled in *Mapp*, and because *Schwartz* preceded this Court's clear statement concerning Section 605's preemption of the field of wiretapping expressed for the first time in *Benanti*.

Assuming the applicability to the states of the exclusionary rule of Section 605, it necessarily follows that a state legislative commission may not use the tape recordings here in question which include the fruits of an illicit telephone wiretap. Section 605 contains an unequivocal and universal prohibition against any and all divulgence of such evidence, by anyone and to anyone. This is another important question which is presented by this appeal.

Conclusion

Appellants respectfully submit that the issues presented herein are substantial, and that this Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2). They pray that this Court grant plenary consideration of this appeal.

Respectfully submitted,

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September 19, 1966.

APPENDIX 1.

Opinion of Supreme Court of Illinois filed on March 24, 1966, rehearing denied on May 18, 1966 (34 Ill. 2d 456, 216 N.E. 2d 679):

MR. JUSTICE HOUSE delivered the opinion of the court:

This litigation is an outgrowth of the much publicized tape recordings procured by unknown persons secretly "bugging" a hotel room with electronic eavesdropping devices and tapping a telephone in the room.

Six persons were served with subpoenas to appear before a Sangamon County grand jury. They filed a petition to suppress certain tape recordings "and all transcripts, reproductions, or excerpts derived therefrom" for use as evidence before any grand jury or in any civil or criminal trial or in any administrative or legislative proceeding or inquiry; to restrain the State's Attorney of Sangamon County from publishing or exhibiting the tapes or excerpts; to compel the State's Attorney to deliver to the circuit clerk the tapes and excerpts for impoundment; and to quash *subpoenas duces tecum* directing them to appear before the grand jury and produce certain documents.

On July 14, 1965, the trial court entered an order quashing the subpoenas, suppressing the tapes and any transcripts or excerpts for use as evidence before the grand jury "or in any administrative or legislative inquiry or proceedings, or for any other use," enjoining the State's Attorney from using the impounded materials or any information obtained from them and impounding the tape recordings. A verbal motion of the State's Attorney to stay the injunction and impoundment of the tapes was denied.

He then presented and asked leave to file a written motion to dismiss and an answer to the petition. Leave was denied. On July 16, the clerk reported compliance with the order by the State's Attorney and the impoundment of the materials. Notice of appeal from the order of July 14 was filed July 27 and the cause was docketed in this court No. 39526.

The second phase of the litigation involves a six-member commission of the House of Representatives of the Illinois General Assembly who are made additional respondents. Members of the commission were appointed pursuant to House Bill 2269, which created the commission for the purpose of investigating the information contained in and arising out of the tape recordings insofar as they might reflect upon or involve civil officers of the State.

On August 5, 1965, six copies of the order of July 14 were delivered to John E. Cassidy, Jr., chairman of the commission, for distribution to the members. The commission nevertheless caused a *subpoena duces tecum* to be served upon the circuit clerk requiring him to produce the impounded tape recordings and documents. Whereupon the original petitioners filed a petition to quash the *subpoena duces tecum*, and the commission moved to dismiss the petition and expunge the order of July 14 insofar as it restrained the powers of the commission. On August 30 the trial court entered an order denying the motion to dismiss, quashed the commission's subpoena, again suppressed the tape recordings and excerpts and enjoined specifically the additional respondents from using or attempting to use them. The order contained a finding that there is no just reason to delay enforcement of or appeal from the order.

We denied a motion for leave to file an original petition for writ of *mandamus* to expunge the orders of July 14

and August 30. The commission then filed notice of appeal to this court from the August 30 order and the appeal was docketed as No. 39710.

While the first appeal arose out of a grand jury proceeding and the second out of legislative action, the two are so entwined and the overtones so intermingled that they should be viewed together. For example, aside from the fact that the same petitioners and same tapes are involved in both actions, the order of July 14, 1965, is broad and encompasses a prohibition of use of the tapes not only before the grand jury but also in any "legislative inquiry or proceedings." Consequently, although the causes were argued separately, they have been consolidated for opinion.

We observe parenthetically that after the second appeal the commission conducted a hearing and the court entered a rule to show cause why the additional respondents should not be held in contempt. An order finding the chairman and one member of the commission in contempt was entered, and the question of punishment continued generally pending this appeal. That order is not an issue here.

Three of the petitioners (Maslowsky, Gottlieb and Kaplan) leased the hotel room in April, May and June, 1965, during the 1965 session of the 74th General Assembly. The tapes allegedly are recordings of their conversations in the hotel room over a period of time. They and the other petitioners are members and officials of the Chicago Currency Exchange Association, Inc. Through anonymous letters, Jack Mabley, a columnist for the *Chicago's American*, a Chicago metropolitan newspaper, was given typed excerpts of tape recordings and "tipped off" to look into certain lockers in a Chicago Greyhound bus depot by means of keys enclosed with the excerpts. He found the 15 tape

recordings here involved and gave them and the excerpts to the State's Attorney of Sangamon County. The petition alleges that both Mabley and the State's Attorney played the tapes to persons who were familiar with the voices of the three petitioners and most of the voices on the tapes were identified as those of the three petitioners.

It is the theory of petitioners that the recordings were obtained surreptitiously by means of electronic devices and the placing of a "tap" on their hotel telephone without their knowledge or consent in violation of the eavesdropping article of the Criminal Code of 1961, (Ill. Rev. Stat. 1965, chap. 38, pars. 14—1 to 14—7,) and in violation of their rights under the fourth, fifth, ninth, and fourteenth amendments of the Federal constitution and sections 2, 6, and 10 of article II of the Illinois constitution.

The People's theory is that petitioners lack standing to maintain this action and that "the fruit of the poisoned tree" doctrine is not applicable on either statutory or constitutional grounds unless some showing is made that some governmental agent participated in the obtaining of the recordings.

On the question of standing it is argued that petitioners failed to bring themselves within the category of persons who may claim a violation of their constitutional rights, and the People cite the following cases which they say support their argument: *Goldstein* v. *United States,* 316 U.S. 114, 86 L. Ed. 1312, which held that persons who were not parties to any conversations intercepted by means of illegal wiretapping could not complain, and *Jones* v. *United States,* 362 U.S. 257, 4 L. Ed. 2d 697. Their quotation from the *Jones* case was misleading. The dilemma of a person seeking suppression of evidence, particularly where possession of the seized property in itself establishes proof sufficient

to convict was recognized, and it was pointed out that enforcement would not be hampered by recognizing that any person legitimately on the premises searched may challenge legality of the search when its fruits are proposed to be used against him.

We think there is a sufficient showing of identity of the three petitioners as three of the persons whose conversations were recorded. True, they did not (and could not since they never heard a play-back of the recordings) swear of their own knowledge that the voices were their own. The State's Attorney must have had reasonable grounds for believing that the voices of the three were on the tapes since he requested their presence to verify that fact. In fact, paragraph 5 of the original petition alleged that the State's Attorney "had procured persons allegedly familiar with petitioners' voices to listen to the recordings and that said persons had identified the voices of Maslowsky, Gottlieb, and Kaplan as those recorded on said tape recordings." This paragraph was sworn to by petitioners' counsel since the statement had been made to him. During a colloquy between counsel and the court the State's Attorney said, "I would think that it is correct that [for] the purpose of this motion the court would accept as true all matters of fact which are properly stated in the petition excluding conclusions, of course." Thereupon counsel for petitioners elected to submit the matter on the sworn petition without putting on proof. This made a *prima facie* case of identity.

The other facet of the question of standing is whether it was established that the recordings were illegally obtained. The petition alleged that the three petitioners had rented and occupied the room as registered guests, that no consent was ever given by them to the recording of their

voices or telephone conversations, that three of the names often referred to in the tapes were contractions of the three petitioners' given names, and that on information and belief the tapes referred to in the newspaper were the same tapes referred to by the State's Attorney which he requested that they listen to in his office. These allegations, coupled with the admitted identity of the petitioners' voices on the tapes, definitely shows standing of the petitioners to be heard on their petition.

Our holding on the question of standing in connection with the original petition is equally applicable to the additional respondents. Both petitions were heard by the same judge. He had previously satisfied himself as to petitioners' identity and that the information had been obtained by "bugging" and wiretapping. The same persons were petitioners in the first petition and both petitions were filed in cause No. 1362-65. Judges do not operate in a vacuum and where, as here, the trial judge had previously found standing of the petitioners, it is not necessary that it be reestablished in the second petition even though it designates different respondents.

Both orders held that the recordings were made in violation of the eavesdropping article, (Ill. Rev. Stat. 1963, chap. 38, pars. 14—1 *et seq.,*) and were based upon that premise. Section 14—1(b) defines an eavesdropper as "any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article." The elements of the offense are set out in section 14—2: "A person commits eavesdropping when he: (a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or (b) Uses or divulges any information which he knows or reasonably

should know was obtained through the illegal use of an eavesdropping device." As to admissibility, section 14—5 provides: "Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings."

The People, unlike the commission, do not attack the eavesdropping statute nor claim its repeal in whole or in part. Rather, they argue that the exclusionary provision does not apply to illegally obtained evidence where a governmental agency had neither knowledge of nor had initiated, authorized or consented to the procurement of the evidence. The argument is predicated upon interpretations of search and seizure and self-incrimination constitutional provisions. A leading case is *Burdeau* v. *McDowell,* 256 U.S. 465, 65 L. Ed. 1048, where illegally stolen papers came into the hands of the government through someone other than a governmental agent. The Supreme Court held that the protection of the fourth amendment against unlawful searches and seizures extended against the use of incriminatory papers only if the government participated in their procurement. (See *People* v. *Touhy,* 361 Ill. 332.) The short answer is that by the enactment of the eavesdropping statute the legislature expanded the exclusionary rule beyond the scope of the rule laid down in the *Burdeau* case. While constitutional doctrine might only require the exclusion of evidence unlawfully obtained by police officers, the legislature has exercised its prerogative and required the exclusion of evidence obtained by any person in violation of the statute.

In the alternative the People contend that use of evidence derived from the tape recordings, even though the recordings were obtained illegally by persons other than the

State, is not prohibited by section 14—5. It is argued that the "fruit of the poisoned tree" doctrine developed in the second *Nardone* case, (*Nardone* v. *United States,* 308 U.S. 338, 84 L. Ed. 307,) with respect to information obtained by government wire tapping, was not adopted by section 14—5 either expressly or by implication, and that derivative evidence should be obtainable through the use of subpoenas.

The eavesdropping statute is broad, and encompasses within the term "eavesdropper" not only a person who participates in the operation of an eavesdropping device but one who uses or divulges information so obtained. When all of the provisions of the eavesdropping statute are considered, particularly sections 14—2(b) and 14—5, it is apparent that the "fruit of the poisoned tree" doctrine has been expressly adopted, (See Cleary, Handbook of Illinois Evidence, 2d ed. (1963) sec. 10.10, p. 164,) and we have no discretion to interpret it otherwise. We are of the opinion that the order of July 14, 1965, was in accordance with the statute and cannot be reversed on the grounds asserted by the People.

We now turn to the contentions made by the commission and to those phases of the case peculiar to that body. It asserts that the eavesdropping statute was superseded by House Bill 2269, which created the commission, that the statute's partial repeal for the purposes of this legislative inquiry is not an unconstitutional invasion of petitioners' rights, since they had no constitutional right to the suppression of evidence of their anonymously recorded conspiratorial conversations, and that the trial court's order violated the separation-of-power article of the State constitution.

While the court's jurisdiction over members of the commission is not attacked until the sixth and final point of the commission's brief, it should be disposed of before we proceed to the substantive questions. It is contended that the entry of the August 30 order without serving the commission members with lawful process deprived them of notice, and the argument is couched in constitutional language as a deprivation of liberty without due process. It is true there was no formal service, although there was full knowledge by the commission members of the order of July 14. Prior to the issuance of the commission's subpoena to the clerk, a letter enclosing six copies of the order was mailed by petitioners' counsel to the chairman for distribution to its members stating that it appeared that the commission intended to attempt to use the impounded tapes. The chairman acknowledged receipt and requested a copy of the judge's memorandum opinion so that he could reproduce copies for the members. The second petition followed issuance of the subpoena and a copy, together with a notice of its presentation, was mailed to each member of the commission, the State's Attorney, and the circuit clerk five days before the hearing, which was set for August 25, 1965.

It is argued that the order of July 14, 1965, ante-dated H.B. 2269, approved on July 21, 1965, (although it had been passed by both houses of the General Assembly prior to the date of the order,) and was void since it in effect enjoined the operation of a statute which had not yet been enacted. The House Bill was, of course, not in effect until it was approved; but even if it were, it was within the jurisdiction of the trial court, right or wrong, to enter an order in the language of the eavesdropping statute, which had not been expressly amended or repealed. It was not necessary that members of the commission have been par-

ties to the cause, when the first order was entered, to be bound thereby so long as they had actual knowledge of the injunction and its contents. "[T]he court had jurisdiction of the persons and the subject matter of the suit and issued the injunction, which was not only binding upon the persons who were actual parties defendant to the bill, but was also binding upon all persons who had actual notice of the contents of the writ, * * *." (*O'Brien* v. *People ex rel. Kellogg Switchboard and Supply Co.*, 216 Ill. 354, 367.) After H.B. 2269 became operative and the commission had been appointed, the restraining order of July 14 applied to the members of the commission. Once the evidence was suppressed it remained suppressed unless and until the order suppressing it was set aside or modified on review. Courts have the full power and authority to enforce their official mandates in a summary manner. (*O'Brien* v. *People*, 216 Ill. 354.) Here, the court had jurisdiction at the time of the entry of its order of July 14. As we have pointed out, the commission had actual knowledge of the order and its contents, and it became binding on its members.

The order of August 30 was identical in effect, if not in content, with that of July 14. The trial court entered it for purposes of clarification, since the commission, by issuing its *subpoena duces tecum* to the circuit clerk, an officer of the court, to produce impounded materials, implied that it was not thereby bound. The court's first order was entered, however, without reference to the controverted effect of H.B. 2269. It was proper that the second petition be docketed in the same cause since the subject matter was the prior order and directed the court's attention to the intended violation of that order. The confusion on the question of jurisdiction over the person apparently arises from an effort to fit this proceeding into the injunctive procedure of the Civil Practice Act, when actually it par-

takes more of the flavor of a motion by a defendant to suppress illegally seized evidence under the Criminal Code. (Ill. Rev. Stat. 1965, chap. 38, par. 114—12.) The action is a hybrid and stems from the inherent power of a court to enforce its mandates. The order of August 30 supplemented and clarified the order of July 14 by specifically spelling out its application to the commission members and quashing the commissions' *subpoena duces tecum* issued in violation of the terms of the first order. Under these peculiar, extraordinary and unprecedented circumstances, we are of the opinion that the commission members, who were bound by the July 14 order until it might be set aside, were subject to the jurisdiction of the court without formal service of process.

H.B. 2269 provided for creation of a commission to investigate the specific tapes and transcripts here involved, with the power and duty "To investigate the background, allegations, and charges arising out of the information contained in tape recordings and transcripts thereof * * * insofar as they reflect upon or involve civil officers of the State whether they be members of the General Assembly or not * * *." The commission was directed to make a report to the Governor and Speaker of the House at least once each month and to submit recommendations.

Aside from the constitutional aspects, the effect, if any, of the enactment of H.B. 2269 on the eavesdropping statute must be determined. The commission argues that H.B. 2269 repealed or superseded the eavesdropping statute to the extent necessary to permit carrying out its terms and that where the provisions are incompatible, a later adopted special statute takes precedence over an earlier general one.

Repeal by implication is not favored and, if possible, statutes will be so construed that one does not operate as a repeal of the other by implication even though there are inconsistencies. (*People ex rel. Myers* v. *Pennsylvania Railroad Co.*, 19 Ill.2d 122; *Village of Glencoe* v. *Hurford*, 317 Ill. 203.) But where the statutes are irreconcilably repugnant, the latter abrogates the former to the extent that they are inconsistent and irreconcilable since it cannot be supposed that the General Assembly intends to enact and enforce laws which are contradictions. (*Rosehill Cemetery Co.* v. *Lieder*, 406 Ill. 458; *Chicago Park District* v. *Harris*, 402 Ill. 214; I.L.P., Statutes, sec. 84.) This special statute, though enacted by the same body, is totally irreconcilable with section 14—5 of the eavesdropping statute which declares inadmissible any evidence obtained in violation of it and prohibits its use in any "legislative inquiry or proceeding."

Petitioners strenuously urge that refusal by the legislature to adopt amendments authorizing limited court-supervised wiretapping for a two-year trial period and passage of House Bill 452 which increased the maximum penalty and permitted portions of illegal recordings to be used as evidence to convict eavesdroppers, reflected an acute awareness by the legislature of the evils and dangers of eavesdropping and wiretapping. It is said that the treatment of the amendments, the passage of H.B. 452 and the fact that H.B. 2269 contained no reference to either the eavesdropping statute or the act of 1927 relating to telegraph and telephone messages, (Ill. Rev. Stat. 1965, chap. 134, par. 15a,) preclude an interpretation that it was the intent of the legislature to amend by implication. H.B. 2269 was unanimously enacted in the face of the generally accepted fact that the tapes were surreptitiously obtained. An inquiry was demanded on the very tapes here involved.

We think the language of H.B. 2269 expresses a clear intent that a legislative investigation be conducted for the purpose of possible impeachment or expulsion of members of the General Assembly and to the extent the eavesdropping statute prohibited "legislative inquiry or proceeding" it was repealed by implication. In fact, the intent was so plain that recourse to usual precepts to gather intent is totally unnecessary. The intent with respect to use of the information for purposes of indictment and prosecution under the Criminal Code is not so apparent. Reference to co-operation with the State's Attorney is susceptible of referring to evidence from other sources developed by the commission while investigating the integrity of civil officials. To hold that H.B. 2269 permitted use of the tapes and transcripts in the courts would effectively emasculate the eavesdropping statute and accomplish its repeal *in toto*, and we see no such intention on the part of the General Assembly.

But petitioners assert that when thus construed H.B. 2269 is unconstitutional legislation and denies their constitutional rights to equal protection of the law and due process. It is said that members of the commission would be conferred a special or exclusive privilege or immunity in violation of section 22 of article IV of the constitution. First, it is alleged that there would be an exemption of this commission to the exclusion of any other legislative committee or the General Assembly itself and, second, that it would create an arbitrary and unconstitutional classification among victims of eavesdropping.

The purpose of H.B. 2269 is a public one. It provides for a legislative inquiry insofar as the materials will reflect upon or involve civil officers of the State, whether they be members of the General Assembly or not. Thus, the

purpose is not just for the benefit of members of the commission, but for the whole General Assembly through its agency, the commission. The petitioners have not been indicted, nor in fact, even accused of a crime. Under our views hereinbefore expressed, the tapes and excerpts cannot be used as evidence before a grand jury or in a criminal proceeding against them because of the unaffected provisions of the eavesdropping statute remaining in full force after the adoption of H.B. 2269. The petitioners have been and may well be further embarrassed by disclosures on the tapes (as may others named therein) but this legislative investigation gives them no constitutional grounds for objection.

We see no valid separation-of-powers problem in the entry of either of the orders under review. The trial court entered the July 14 order based on the eavesdropping statute. The order was for the purpose of enforcing a valid pronouncement of the legislature, not in derogation of its prohibition against the use of recording devices. The broad terms of the order were in the language of the statute. The order of August 30 was practically identical with the first without giving effect to H.B. 2269. This did not mean that restraining use of the materials by the commission constituted interference with the legislative branch of the State government but was, at most, an interpretation that H.B. 2269 did not supersede the eavesdropping statute or repeal it in whole or in part by implication. Interpretation and enforcement of statutes is a function of the courts and does not constitute interference with legislative prerogatives. (*Cf. Arlington Heights National Bank* v. *Village of Arlington Heights,* 33 Ill.2d 557.) The question of the effect of H.B. 2269 has given considerable concern to all, including able counsel in these consolidated cases. The fact that the trial judge viewed it

differently than we do does not mean that there was a violation of the separation-of-powers article when he failed, or refused, to give the effect to H.B. 2269 that was attributed to it by the commission.

We are of the opinion that the first order was proper at the time it was entered, but became subject to modification when the General Assembly spoke through H.B. 2269; and that the second order went too far in restraining the legislative inquiry demanded by H.B. 2269.

The orders of the circuit court of Sangamon County of July 14, 1965, and August 30, 1965, are affirmed, except as to the prohibition against use of the tapes, transcripts and excerpts by the commission in its inquiry; and insofar as the limited use of the tapes and materials by the commission was prohibited, both orders are reversed and the consolidated cause remanded with directions to modify same in accordance with the views herein expressed.

Affirmed in part and reversed in part, and remanded with directions.

MR. JUSTICE UNDERWOOD, dissenting:

I would reverse the trial court *in toto* since I believe the petitioners have failed to make a sufficient showing of violation of the eavesdropping statute to authorize suppression of the tape recordings. This view stems in large part from my disagreement with the construction of the eavesdropping act adopted by a majority of this court in *People* v. *Kurth*, No. 38264, decided this term. That opinion held recordings of conversation inadmissible against any party thereto who had not consented to such recording. For the reasons set forth in my dissent filed in that case, I believe such recordings admissible against all parties to the conversation if consented to by any.

Based upon this premise and upon the further premise that "The burden is, of course, on the accused [petitioner seeking suppression] in the first instance to prove to the trial court's satisfaction that wire-tapping [eavesdropping] was unlawfully employed," (*Nardone* v. *United States*, 308 U.S. 338, 341, 84 L. Ed. 307, 312,) the petitions filed are inadequate to establish a violation of the statute upon which suppression of the tape recordings is predicated. It appears from the trial court proceedings that there are a number of conversations recorded on the tapes and that such conversations involve voices in addition to those assumed to be petitioners. Since I believe consent of any of these parties to recording of the conversations in which they participated would render the recordings of such conversations admissible against all participants therein, it follows that an affirmative showing of the total absence of such consent is necessary before violation of the statute can be said to be established and suppression authorized. At no point in the petitions or trial court proceedings was there any assertion by petitioners that *no* party to any of the conversations had consented to the recording thereof. In the absence of such affirmative allegation or proof, a violation of the eavesdropping statute is not, in my judgment, established, and the prohibition of section 14—5 against use of the recordings does not come into effect. Nor can petitioners claim they are unable to negate consent by other parties because they have "never heard a play-back of the recordings". Petitioners were invited to come to the State's Attorney's office and listen to a play-back. They refused to go, and should not now be permitted to use their voluntary refusal to listen as an excuse for their failure to allege or establish a lack of consent by all parties to the conversations. Obviously, petitioners are the individuals best able to identify the persons whose voices are recorded and to ascertain whether any of such persons consented to such recording.

The petitions are, in my judgment, insufficient for an additional reason—there is no positive, affirmative allegation that petitioner's voices are among those upon the tapes, and thus no standing is shown entitling petitioners to complain of use of the recordings. It is usually required of one who seeks to suppress evidence he claims to have been illegally secured that he first establish that it is *his* personal rights which were violated in securing the evidence and that *his* rights would be violated by its use. The allegations of the petition here are only that certain newspaper stories state the voices to be those of petitioners; that petitioners have been informed that voices on the tapes have been identified by third persons as those of petitioners; and that "*if authentic,* and *if recording their voices*" such recordings were unlawfully obtained. Such equivocation scarcely merits consideration as meeting ordinary requirements for establishing standing. Waiver of the usual showing in these cases is justified by the majority on several grounds, among which is the inability of petitioners to make such allegation since they have not heard the tapes played back. This excuse was, I believe, adequately answered earlier by the fact that they were invited to listen to the tapes and refused.

An additional ground upon which the finding of standing rests in the majority opinion is "the admitted identity of the petitioners' voices on the tapes." The conclusion that identity was admitted by the State's Attorney arises from his oral statement during a colloquy at the hearing on the motion to dismiss the petition. The State's Attorney said: "I would think that it is correct that [for] the purpose of this motion the court would accept as true all matters of fact which are properly stated in the petition excluding conclusions, of course". This is nothing more nor less than

a reiteration by counsel of the usual rule of procedure—that a motion to dismiss admits the well-pleaded factual content of the challenged document. The conclusion that this constituted an admission of identity of voices is sustainable only if the petition contained a factual allegation that petitioners' voices are on the tape, and it is precisely this factual allegation which is missing not only from the petition but from the entire proceedings. It is alleged that newspaper stories say some of the voices have been identified as petitioners'; the State's Attorney admits newspapers have said this, but, clearly, he cannot be said to admit the truth of the newspaper statement for its truth is not alleged. I am not aware that we have ever held a newspaper's statement of a conclusion to be the equivalent of a positive factual allegation by a pleader. It is also alleged that the State's Attorney had told petitioners' counsel that third parties had identified voices on the tapes as those of petitioners. Some dispute exists as to the accuracy of this allegation, but, in any event, even its admission establishes only that third parties identified the voices as petitioners'—not that they are petitioners' voices. Petitioners never allege the identification to have been correct, and the State's Attorney scarcely can be held to have admitted that which petitioners have consistently and carefully avoided claiming—that any of the voices upon the tapes are, in fact, theirs. In short, since there has never been an unequivocal statement by petitioners that their voices appear on the tapes, I cannot agree that the identity of the voices has been admitted. That no such admission was ever intended or made is, I believe, further demonstrated by the State's argument supporting the motion to dismiss which emphasizes the total absence of allegations or proof that petitioners' voices appear on the tapes, and the attempt, following denial of the motion to

dismiss, to file an answer denying the allegations of the petition to suppress, the legal sufficiency of which had been sustained (erroneously, in my opinion) by the trial judge.

Since the "standing" and consent questions are identical in both cases, I would hold that, absent an affirmative showing that petitioners' voices are among those recorded and that no party to any of the conversations had consented to the recordings, the State's motion to dismiss the petition to suppress and impound the tapes in case No. 39526 and the commission's motion to dismiss the petition to quash the *subpoena duces tecum* in No. 39710 should have been allowed. Consequently, I would reverse both the July 14 and August 30 orders of the trial court.

MR. JUSTICE SCHAEFER joins in this dissent.

APPENDIX 2.

Order entered by Hon. Creel Douglass, Chief Judge of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, on July 14, 1965:

This cause came on for hearing on the Petitions of Petitioners, David Maslowsky, George Christopher, Sam J. Kaplan, F. W. Schellenberger, Irving L. Gottlieb, and Barbara Slove. The Court has heard and considered the arguments of counsel and is fully advised in the premises. Contemporaneously with the entry of this Order, the Court has filed with the Clerk of this Court a memorandum opinion summarizing the grounds for the Court's decision. The Court finds that Petitioners are entitled to all of the relief requested in parts I and II of their Petitions.

The Court finds that there is no just reason to delay enforcement of or appeal from this Order.

IT IS THEREFORE ORDERED:

1. The tape recordings referred to in the Petitions and all copies thereof in the possession of the State's Attorney of Sangamon County, his agents and employees, and others acting in concert with them, as well as typewritten or other transcripts or summaries thereof, memoranda, excerpts, or any writing or recording of any nature whatever of, reproduced or derived from, or based upon, said tape recordings, are suppressed for use as evidence before the grand jury of Sangamon County, or any other grand jury, or in any civil or criminal trial or in any administrative or legislative inquiry or proceedings, or for any other use.

2. The State's Attorney of Sangamon County, his agents and employees and any person acting in concert with them or any of them are restrained and enjoined from using or attempting to use or publishing, uttering or exhibiting, directly or indirectly, the aforesaid tape recordings or typewritten excerpts therefrom to any one or for any of said purposes or any other purpose, except only upon express order of this Court upon written petition by the State's Attorney and with due advance notice thereof to Petitioners and their counsel.

3. Any witness (including petitioners,) testimony, documents or evidence of any nature whatever, which the State's Attorney of Sangamon County learned of, obtained or derived, directly or indirectly, from or based upon the materials referred to in paragraph (1) above, and any information, obtained from that material are suppressed for use as evidence before the grand jury of Sangamon County, or any other grand jury, or in any civil trial or in any administrative or legislative inquiry or proceeding.

4. The State's Attorney of Sangamon County, his agents and employees and any person acting in concert with them, are restrained and enjoined from using or attempting to use the aforesaid materials for any of said purposes or any other purpose, except only upon express order of this Court upon written petition by the State's Attorney and with due advance notice thereof to Petitioners and their counsel.

5. The State's Attorney of Sangamon County, his agents and employees, and all persons acting in concert with them are directed to deliver to the Clerk of this Court, on or before July 15, 1965 at 10:00 o'clock

a.m., the aforesaid recording tapes and all copies thereof in his possession or control as well as all transcripts, excerpts, memoranda or writings or recordings of any nature whatever, of or derived from or based upon said tape recordings, or from information, inferences, suspicions, deductions or leads obtained therefrom. The Clerk of this Court is directed immediately to seal all such documents in a container, and to keep said documents in a safe place without disclosing the contents thereof to any person, except only upon express order of this Court upon written petition by the State's Attorney and with due advance notice thereof to Petitioners and their counsel.

6. The subpoenas served (copies of which are attached to the Petitions as Exhibits one through six) upon Petitioners directing them to appear before the Sangamon County Grand Jury, Springfield, Illinois on July 15, 1965, and directing them to produce specified documents, are hereby quashed and held for naught.

APPENDIX 3.

Memorandum filed by Hon. Creel Douglass, Chief Judge of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois on July 14, 1965:

Based upon the sworn petition filed herein and the arguments of counsel, the court finds that certain tape recordings have been obtained in direct violation of the Illinois Eavesdropping Act, which Act makes it a crime to eavesdrop and which prohibits the use of the fruits of an unlawful eavesdropping. Since it appears that the Eavesdropping Act has been violated, it necessarily follows that this Court should and must impound the tapes and typewritten transcripts thereof which are now in the possession of the State's Attorney of Sangamon County and all information derived therefrom. Further, it appears that Subpoenaes Duces Tecum have been served upon the petitioners herein which require them to bring the records of the Chicago Currency Exchange Association, Inc. before the Grand Jury, which subpoenaes were issued by the State's Attorney of Sangamon County coincidentally with the announcement of the illegal eavesdropping. These subpoenaes state that the subject of the Grand Jury investigation is bribery rather than a violation of the Eavesdropping Act. The Court has no alternative but to suppress not only the tapes in question, but also the things which have been learned by reason of the unlawful eavesdropping. This necessarily requires that the Court quash the subpoenaes heretofore issued.

It further appears from the Petitions and Exhibits that the constitutional rights of petitioners have been violated, and those violations provide additional grounds for the Court's order.

APPENDIX 4.

Order entered by Hon. Creel Douglass, Chief Judge of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, on August 30, 1965:

This cause came on for hearing on August 25, 1965 on the petition of petitioners David Maslowsky, George Christopher, Sam J. Kaplan, F. W. Schellenberger, Irving L. Gottlieb, and Barbara Slove, and on the Motion to Dismiss of Additional Respondents. The Court has heard and considered the arguments of counsel, has read and considered the written memorandum submitted by Additional Respondents, and is fully advised in the premises.

The Court finds that there is no just reason to delay enforcement of or appeal from this Order.

IT IS ORDERED:

1. The Motion to Dismiss of Additional Respondents is denied.

2. The subpoena heretofore served by the Illinois House of Representatives Commission created under House Bill 2269, 74th Illinois General Assembly, upon Joseph P. Knox, Clerk of this Court (a copy of which is attached to the petition as Exhibit 1) directing him to appear before the Commission at Chicago, Illinois on September 2, 1965, is hereby quashed and held for naught.

3. The tape recordings referred to in the petition and the typewritten excerpts therefrom, and any witness, testimony, document, evidence, or information of any nature whatever, which the Commission may learn of, obtain or derive, directly or indirectly, from or

based upon said tapes or excerpts, are suppressed for use as evidence before said Commission.

4. The Chairman and Members of said Commission, their agents, employees, and successors, and any person acting in concert with them, are enjoined from using or attempting to use the materials referred to in paragraph three hereof for any of the purposes referred to in paragraph three.

APPENDIX 5.

Memorandum filed by Hon. Creel Douglass, Chief Judge of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, on August 30, 1965:

The tape recordings involved in this case were obtained in violation of an Illinois statute, passed in 1957, which makes it a crime to secretly record the conversations of others.

That statute expressly provides that unlawfully obtained recordings may not be used in legislative inquiries or before any court or grand jury.

This Court is duty bound to enforce that statute, and to prohibit this legislative Commission from attempting to violate the law. The members of the House Commission are subject to the laws of this State which they and their fellow legislators have enacted.

The Court intends no criticism of the Commission or its members. They are undoubtedly well intentioned. But they are not immune from the law.

This Court adopts the views expressed many years ago by the great Justice Louis Brandeis:

> "Decency, security and liberty alike demand that government officials shall be subjected to the

> same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

Therefore, the subpoena served on the Clerk of this Court by the House Commission must be quashed, and the Commission will be enjoined from using the unlawfully obtained tapes or any information obtained from those tapes.

APPENDIX 6.

House Bill 2269 (1 Laws of Ill.—14th Genl. Assembly 1855 (1965)), as approved July 21, 1965, reads:

> An Act creating a commission to investigate facts reflecting upon the integrity of certain civil officers of this State, enumerating its powers and duties and making an appropriation therefor.
>
> WHEREAS, the States Attorney of Sangamon County was given on June 23, 1965, certain tape recordings, and transcripts thereof, which, upon investigation, may provide the basis for possible prosecution of certain civil officers of this state, including members of this General Assembly; and
>
> WHEREAS, the tape recordings, and the transcripts thereof, cast serious reflections upon the integrity of

such officers, thus compelling the General Assembly to immediately determine the truth of the matters contained in said tape recordings and transcripts thereof in order that it may, if necessary, exercise and perform the powers, duties, and responsibilities placed upon it by the Constitution of this State; and

WHEREAS, the General Assembly, and more particularly each house thereof, may be required under the Constitution to take one or more of the following alternative courses of action:

1. The House of Representatives may be required to commence by presentment either to a regular session of the General Assembly or to a special session thereof impeachment proceedings against one or more of said civil officers under the provisions of Section 15 of Article V and Section 24 of Article IV of the Constitution.

2. Either house of the General Assembly may be required under Section 9 of Article IV of the Constitution to undertake expulsion proceedings against one or more of its own members.

3. Either house of the General Assembly may be required to implement the self-executing provisions of Sections 4 and 5 of Article IV of the Constitution of this State.

4. Either house may be required to undertake such action as may be appropriate; therefore

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. There is hereby created a commission composed of six members of the House of Representatives of the Seventy-fourth General Assembly of the State of Illinois, no more than three of whom shall be adherents of the same political party, appointed by the Speaker thereof. Said commission shall have the following powers and duties:

a. To investigate the background, allegations and charges arising out of the information contained in tape recordings and transcripts thereof which were delivered to the States Attorney of Sangamon County on Wednesday, June 23, 1965 insofar as they reflect upon or involve civil officers of the State whether they be members of the General Assembly or not, or any prior or further such tape, allegation or charge.

b. To examine the various alternative courses of action available to the General Assembly in connection with the foregoing allegations and charges whether they be provided in the Constitution or otherwise.

c. To exercise in connection with their examination all the procedural powers provided in "An Act to revise the law in relation to the General Assembly," approved February 25, 1874, as amended, more particularly but not limited to Sections 4, 5, 6, 7, 8, 9 and 10 thereof.

d. To cooperate to the fullest extent with the States Attorney of Sangamon County in investigating, verifying, collecting and preserving any and all evidence bearing upon the charges and allegations arising out of said tape recordings and the transcripts thereof developed by the commission during the course of its performance of its duties.

e. To make a written report from time to time, and not less frequently than once each month, of the results of its investigations to the Governor of this State and to the Speaker of the House of Representatives, which reports shall be placed on file with the Secretary of State of the State of Illinois and open to public inspection.

f. To make any or all of the following recommendations to the following persons:

(1) To recommend to the Governor of this State the convening of the General Assembly in extraordinary session for whatever specific purpose the investigation of the commission appears to it to warrant.

(2) To recommend to the States Attorney of Sangamon County whatever appropriate action, if any, its investigation discloses.

g. To adopt rules governing its proceedings.

h. To employ such technical professional and clerical assistance as may be necessary.

APPENDIX 7

The following provisions of the United States Constitution and of the statutes of the United States are involved in this case:

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in part:

> " . . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . "

The Ninth Amendment to the United States Constitution provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment to the United States Constitution provides in part:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 605 of the Federal Communications Act (47 U.S.C. § 605) provides in part:

". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ."

APPENDIX 8

The Illinois Eavesdropping Act (Ch. 38, §§14-1 to 14-7, Ill. Rev. Stat. 1965) provides in part:

"14-1. Definition. (a) Eavesdropping device.

"An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

"(b) Eavesdropper.

"An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.

"(c) Principal.

"A principal is any person who:

"(1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or

"(2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or

"(3) Directs another to use an eavesdropping device illegally on his behalf."

"14-2. Elements of the Offense. A person commits eavesdropping when he:

"(a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

"(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device.

[Section 14-3 provides for certain exemptions from the Act, such as listening to public radio and television broadcasts, etc.]

"14-4. Penalty. Any person convicted of eavesdropping shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both, or imprisoned in the state penitentiary from one to two years.

"14-5. Evidence Inadmissible. Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings[; provided, however, that so much of the contents of an alleged unlawfully intercepted, overheard or recorded conversation as is clearly rele-

vant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this Article].''*

''14-6. Civil Remedies to Injured Parties. Any or all parties to any conversation upon which eavesdropping is practiced contrary to this Article shall be entitled to the following remedies:

''(a) To an injunction by any court of competent jurisdiction prohibiting further eavesdropping by the eavesdropper and by or on behalf of his principal, or either;

''(b) To all actual damages against the eavesdropper or his principal or both;

''(c) To any punitive damages which may be awarded by the court or by a jury;

''(d) To all actual damages against any landlord, owner or building operator, or any common carrier by wire who aids, abets, or knowingly permits the eavesdropping concerned;

''(e) To any punitive damages which may be awarded by the court or by a jury against any landlord, owner or building operator, or common carrier by wire who aids, abets, or knowingly permits the eavesdropping concerned.''

[Section 14-7 relates to assistance by common carriers in detecting eavesdropping.]

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* Bracketed portion was added by an amendment enacted at the 1965 session of the Illinois General Assembly, effective August 20, 1965.

APPENDIX 9.

The judgment of the Supreme Court of Illinois in cases Nos. 39526 and 39710 is as follows:

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the orders of the Circuit Court of Sangamon County of July 14, 1965 and August 30, 1965, except as to the prohibition against use of the tapes, transcripts and excerpts by the Commission in its inquiry, is there anything erroneous, vicious or defective, and in that part of the record there is no error.

THEREFORE, it is considered by the Court that the orders of the Circuit Court of Sangamon County of July 14, 1965 and August 30, 1965, except as to the prohibition against use of the tapes, transcripts and excerpts by the commission in its inquiry, aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

And it is further considered by the Court that in the rendition of the orders of the Circuit Court of Sangamon County of July 14, 1965 and August 30, 1965, insofar as the limited use of the tapes and materials by the commission was prohibited, there is manifest error.

THEREFORE, it is ordered by the Court that for that error and others in the record and proceedings aforesaid the orders of the Circuit Court of Sangamon County of July 14, 1965 and August 30, 1965, insofar as the limited use of the tapes and materials by the commission was prohibited, in this behalf rendered, BE REVERSED, ANNULLED, SET ASIDE AND WHOLLY FOR NOTHING ESTEEMED, and the consolidated cause be remanded to the Circuit Court of Sangamon County with directions to modify same in accordance with the views expressed in the opinion attached to this mandate.

I, MRS. EARLE BENJAMIN SEARCY, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.